Supreme Court, U.S.
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No. 93-860

IN THE
Supreme Court of the United States
October Term, 1993

SHIRLEY IVY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DONALD IVY, DECEASED; CHARLES JARDON AND TONY K. JARDON, INDIVIDUALLY AND AS NEXT FRIEND OF CHARLES JARDON, JR.; ROBIN JARDON, WARREN JARDON AND SHARON JARDON; SHIRLEY ZALEWASKI, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF YEN ZALEWASKI, DECEASED; GARY THOMAS; MARY LEE THOMAS; JAMES L. KENT; EMMA I. KENT; DAWN MARIE INMAN, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF BOBBY JOE INMAN, DECEASED; JAMES DONALD DELOATCH; JOYCE DELOATCH; URSULA MARGOT PARRY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JAMES D. PARRY, SR., DECEASED; JAMES D. PARRY, JR.; JAMES CHRISTOPHER PARRY,

Petitioners,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T H AGRICULTURE & NUTRITION COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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February 10, 1994

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16 pp

TABLE OF AUTHORITIES

Cases: **Page**

Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Engineers, 398 U.S. 281 (1970) 7-8
Battle v. Liberty Nat'l Life Ins. Co., 877 F.2d 877 (11th Cir. 1989) 7
Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) . . . 7
De Cosme v. Sea Containers, Ltd., 874 F.2d 66 (1st Cir. 1989) 8
Michael H. v. Gerald D., 491 U.S. 110 (1989) 5
In re Real Estate Title and Settlement Services Antitrust Litigation, 869 F.2d 760 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 77 (1989) 6
Lamb Enters., Inc. v. Kiroff, 549 F.2d 1052 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977) 8
Mitchum v. Foster, 407 U.S. 225 (1972) 8
Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974) 8
United States v. Carolene Products Co., 304 U.S. 144 (1938) 5
United States v. City of New York, 972 F.2d 464 (2d Cir. 1992) 4
Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) 3-4

Constitutional Provisions, Statutes and Rules:

28 U.S.C. § 1441 5
28 U.S.C. § 1442 5
28 U.S.C. § 1442a 5
28 U.S.C. § 1443 5
28 U.S.C. § 1444 5
28 U.S.C. § 1452 5
28 U.S.C. § 1651(a) . . . . . *passim*
28 U.S.C. § 2283 6

Miscellaneous:

J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1988) 5

REPLY TO BRIEF IN OPPOSITION

The Petition for Writ of Certiorari demonstrated that the Second Circuit's decision below poses a serious threat to basic principles of federalism and due process. In particular, petitioners explained how the Second Circuit's novel doctrine, designed to allow the removal of "otherwise unremovable" cases, employs the All Writs Act as an eighth head of *subject-matter removal jurisdiction over newly filed cases*, on top of the seven specific removal provisions enacted by Congress. *See* Pet. at 9, 14-15, 23-24. In light of this expansive construction of the All Writs Act, which had somehow escaped the attention of courts and scholars alike for nearly two centuries until the Second Circuit uncovered it in 1988, petitioners posed the question of "[w]hether federal district judges may circumvent the limitations Congress wrote into its seven removal statutes" by using the All Writs Act in this broad manner. Pet. at i.

Respondents argue that petitioners' framing of the case "vastly distort[s] and overstate[s] what the court of appeals actually held." Brief in Opposition ("Opp.") at 9. Implementing this theme, respondents present two central arguments against review of the first Question Presented. The first is a make-weight attempt to distract this Court and to impugn the integrity and competence of the attorneys general of all 50 States, who have appeared as *amici* urging that certiorari be granted. Respondents' second argument is an elaborate effort to narrowly cast, and thereby hopefully rehabilitate, the Second Circuit's judgment, and thus compress the question presented. Here, respondents claim that the district court could have enjoined continued litigation of this Texas case, so that to accept removal was a proper alternative "remedy" under the All Writs Act. Ironically, if respondents' rehabilitation of the decision below were accepted, the actual result would be to strengthen the argument for certiorari by thrusting forward additional facets of the case worthy of this Court's review.

1. In their initial, make-weight argument, respondents repeatedly assert that in the process of approving the 1984 settlement the district court in *In re Agent Orange* issued an order enjoining petitioners from filing any state-court action relating to Agent Orange. They state that *petitioners could have been held in contempt* for filing their Texas lawsuit. *See, e.g.*, Opp. at i, 10, 21. Respondents do so, in part, to intimate that petitioners' overall legal position is academic and that petitioners should not be heard

to complain about the niceties of removal jurisdiction. Primarily, however, respondents level this charge in an attempt to explain away the noteworthy, unanimous appearance by all 50 States supporting petitioners' analysis of the decision below and urging the need for immediate review of the Second Circuit's All Writs removal doctrine.[1] Respondents denigrate the filings of these "several states," Opp. at 23 n.8, postulating that the attorneys general of all 50 States are laboring "under a material misunderstanding of both the facts of this case and the Second Circuit's narrow decision." *Id.*

The claim that petitioners could be held in contempt for an injunction issued in 1985 is ludicrous. Tellingly, respondents offer no supporting citations. To be sure, in its 1992 decision below the district court did opine that although its 1985 judgment entering the settlement was "not *labeled* an injunction" against future litigation, "the court *effectively* issued an injunction which bars the current actions." **A52** (emphasis added).[2] However, respondents fail to disclose that an *amicus* brief filed by 21 States in the Second Circuit (see Appendix hereto) meticulously demonstrated that the 1985 judgment could not possibly constitute an "injunction" under which petitioners could now be threatened with contempt, and showed that the district court's indulgence in *post hoc* revisionism is barred under this Court's precedents. Significantly, the Second Circuit carefully avoided grounding its decision on this "effective injunction" hypothesis, presumably because of the powerful arguments countering it presented by the 21 States. Respondents' insinuation that the state attorneys general know almost nothing

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[1] *See* Brief *Amici Curiae* of the State of Texas, *et al.*, in Support of Certiorari at 1 ("We agree with petitioners that [the Second Circuit's] decision, which reflects a clear conflict between the circuits, embraces a drastic and disturbing removal doctrine, one that authorizes a federal court to disregard the seven specific removal provisions enacted by Congress and to remove a case from a state court whenever it suits the perceived needs of the federal court."); Brief *Amici Curiae* of the State of Missouri, *et al.*, at 2 ("We . . . adopt without reservation the arguments . . . [of Texas' brief]. * * * Article III federal courts . . . have no power to divest state courts of their jurisdiction unless that power has been granted to them.").

[2] This statement disproves respondents' assertion that petitioners could be held in contempt for violating the express, unambiguous terms of an injunction. Respondents' brief fails to apprise the Court of this key passage.

about this case, even though they have appeared as *amici* since the district court stage and even though they specifically rebutted the "effective injunction" theory relied on by respondents, is as ridiculous as it is insulting.

2. Respondents focus most of their energy on an attempt to recast and thereby rehabilitate the decision below, which they portray as a modest and sensible decision, one limited to the unique facts of this case. They argue that "the district court had 'continuing jurisdiction' over the *Agent Orange* class action" given its supervision of the settlement Fund, and thus possessed plenary and perpetual power under the All Writs Act to issue necessary or appropriate orders to "enforce" the 1984 class action settlement. Opp. at 16-17. Respondents further urge that "the whole point of the All Writs Act is to provide federal courts with remedies not otherwise specifically authorized by Congress" so that "removal *as a remedy*" is an available option. Opp. at 19 (emphasis added).

Claiming that the district court in this case "had the power under the Anti-Injunction Act to enjoin the Texas state court actions as necessary to prevent 'rulings inconsistent with the prior federal order,'" Opp. at 21 (quoting **A55**), respondents argue that the "removal as a remedy" employed below is "'the preferred method of enforcement, since it *affords greater comity to state courts* and is less burdensome on the parties than an injunction or contempt citation would be.'" Opp. at 21 (quoting **A55**) (emphasis in Opp.). Thus, the question that respondents wish to put at issue is whether petitioners' Texas state court lawsuit "could be enjoined by the federal court to protect the integrity of the federal judgment and the settlement fund being administered by the court," clearing the way for removal as a less burdensome remedy. Opp. at i.

Respondents' strategy provides no basis for denying certiorari. **First**, respondents' attempts at recasting the decision below based on the facts of this case fall flat. Rather than adopting this "remedy" analysis, the decision below forthrightly characterized the All Writs removal doctrine as "an exception to the 'well-pleaded complaint' rule." **A7**. Indeed, the Second Circuit has made clear from the beginning that its All Writs removal doctrine operates as an eighth head of subject-matter removal jurisdiction. In *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert.*

denied, 489 U.S. 1077 (1989), the district court's reason for removing the case was that a state court might interfere with civil rights remedies by deciding a state court eminent domain proceeding incorrectly. The Second Circuit expressed "serious doubts . . . whether the removal statutes provided a proper basis" for removal. *Id.* at 863. But the court rejected the idea that "the federal removal statutes are the exclusive sources of removal jurisdiction," and approved the district court's finding of "an independent basis for removal jurisdiction under the All Writs Act." *Id.* The stinging dissent in *Yonkers* certainly recognized the Second Circuit's doctrine as a new, judge-made removal provision. It noted that under the provisions enacted by Congress, removal was "manifestly not warranted" on the record of the case, and condemned the majority analysis as "a novel and unwarranted application of the All Writs Act which is abusive of . . . the most elementary principles of the comity that should exist between federal and state courts." *Id.* at 874, 876 (Mahoney, J., dissenting).[3]

Fairly viewed in terms of how the Second Circuit has proceeded, the broad issue necessarily posed by this case is whether it is sensible to speak (as respondents do) of removal as constituting a "remedy" under the All Writs Act — whether a federal district court possessing subject-matter jurisdiction in *one* case can assert subject-matter jurisdiction over a *new*, "otherwise unremovable" state court case simply by invoking the All Writs Act where a court deems it "appropriate" to do so. *See* Opp. at 18-20. As the 50 States have framed the point:

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[3] *See also United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992) (upholding All Writs removal on the fear that if the state court were allowed to decide a challenge to certain sewage disposal contracts, compliance with a federal consent decree might be hindered). The very different factual backgrounds of *Yonkers*, *City of New York* and this case reveal that there is nothing about the Second Circuit's holding in this case that is peculiar to the preclusive effect of class actions or to the Agent Orange litigation specifically. Rather, the All Writs removal doctrine appears to permit a federal district court, in any civil case, in its discretion to lift an "otherwise unremovable" case out of state court, as long as the district court has a past or present case that seems complex and/or important, and so long as it seems that the state court might do something inconsistent with earlier federal court actions, either because it is presumed that the case is too hard for the state court or because the state court otherwise cannot be trusted with the case.

> We fully agree with petitioners that [the All Writs Act] has nothing to do with conferring removal jurisdiction or any other kind of jurisdiction over a case. *See* Petition at 16-17. The All Writs Act only specifies certain powers of federal courts *once they are properly exercising jurisdiction over a case*. *Id.*

Brief *Amici Curiae* of the State of Texas, *et al.*, at 9.

The lower federal courts should not be permitted to "mix and match" the two separate statutory schemes governing removal *jurisdiction* (specified in 28 U.S.C. §§ 1441(a) & (d), 1442, 1442a, 1443, 1444 and 1452) and the *remedies* that might issue in a given case (governed by 28 U.S.C. § 1651(a) and other statutes). To permit this type of jurisprudential cross-dressing violates the axiom that Congress has ultimate control over the jurisdiction and remedial powers of federal courts, and that these courts may not rewrite the congressionally created scheme even if they believe it good policy to do so. *See* Pet. at 12-13 n.15, 15 n.23, 16-19.[4]

The Second Circuit's hybrid doctrine has been followed by at least two district courts outside the Second Circuit (*see* Pet. at 11 n.13) and, if respondents are correct, by the Ninth Circuit as well (*see* Opp. at 15). The logic behind the doctrine has been rejected by courts in three other circuits (*see* Pet. at 11 n.14),[5] and by this Court in decisions ignored by respondents (*see* Pet. at 17 & n.26).

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[4] Respondents' argument illustrates the perils of such a mix-and-match approach. Respondents confound *personal* jurisdiction and *subject-matter* jurisdiction when they claim that "the courts below did not employ the All Writs Act as [a] basis for federal [subject-matter] jurisdiction" over Ivy because such jurisdiction "already existed with respect to these petitioners by virtue of their membership in the class." Opp. at 11. Federal subject-matter jurisdiction pertains solely to a *case or controversy*; Congress has created no species of subject-matter jurisdiction over private *persons*. Respondents' conflation of personal and subject-matter jurisdiction makes the "removal as a remedy" theory a jurisdictional chimera.

[5] The conflict is real; nothing in the cited decisions of the Fifth and Tenth Circuits, and the Fourth Circuit district court, suggests that they would adopt the Second Circuit's free-floating approach to judicial power under the All Writs Act. Nor is it "highly revealing that petitioners relegate to a footnote" their citation of these cases. Opp. at 14. The placement of material in a footnote is hardly a sign that it is unimportant. *See, e.g., United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938); *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1988).

At least in the class action context, as long as *any* circuit uses this doctrine, there will be "an enormous magnetic pull" toward forum-shopping, causing class actions to be filed in that circuit. *See* Brief *Amici Curiae* of the State of Texas, *et al.*, at 13. Prompt review to defend the integrity of Congress's choices is therefore imperative.

Second, in any event, there is nothing to respondents' assertion that the district court on this record could have simply enjoined petitioners from continuing their lawsuit in Texas. Respondents state that "[t]he Second Circuit found that such power was available as an alternative in this case." Opp. at 20 (citing **A10**). If the Second Circuit had made such a finding, that would only widen the importance of the first Question Presented. In fairness, however, the Second Circuit did not actually *hold* that an injunction could have issued against petitioners in this case, nor did the district court.[6] For three reasons, an injunction would have been improper:

(a) Lack of minimum contacts. Before the district court could entertain a motion to enjoin petitioners from litigating in Texas, it would have to establish the existence of minimum contacts sufficient to convey personal jurisdiction.[7] It is difficult to see how this could be done on this record. *See* **A70-71** (Aff. of Shirley Ivy).

(b) The Anti-Injunction Act. Most basic of all, the Anti-Injunction Act, 28 U.S.C. § 2283, in force since 1793, provides

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[6] The Second Circuit explicitly stated that it was "[a]ssuming *without deciding* that removal of a case is sufficiently akin to an injunction to come within the [Anti-Injunction] Act's ambit," and indicated (in dictum) only its view that exceptions to *the Anti-Injunction Act* might well exist on the facts of this case. **A10** (emphasis added). Respondents' bare assertion that the district court "unquestionably could enjoin petitioners from proceeding against defendants in state court," Opp. at 21 n.6, shows a confidence not shared by the district court below. In an otherwise exhaustive opinion addressing all of respondents' arguments, the district court failed even to address the motion for an injunction, *see* **A56**, suggesting that the matter is not as easy as respondents pretend.

[7] *See In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760, 764 n.1, 769-70 (3d Cir. 1989) (holding that a litigant can "properly raise its due process claim on collateral attack"; the "minimum contacts requirement" does not "wreak havoc on the class action system" because since *Hansberry v. Lee* "collateral attacks have been considered to be a necessary part of the class action scheme," and defendants may not "funnel all of these challenges into the class action court by bringing injunction actions").

that a federal court may not enjoin state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Act is a linchpin of federal-state relations, for "[o]bviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970). In this case, as in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), the last, "relitigation" exception to the Act "is the only one even arguably applicable here." *Id.* at 146-47.[8]

It has long been clear that "an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court," based on "the precise state of the record and what the federal order *actually* said," not "what the order was *intended* to say." *Id.* at 148. Obviously, petitioners did not litigate their present tort claims in 1984; those claims did not even *exist* until later. *See* Pet. at 8. n.10. Nor have petitioners (or anyone else) ever before litigated in another court the detailed due process objections contained in the Petition (at 25-30); and no analysis of these arguments appears in any *Agent Orange* decision prior to the decisions in this case. Respondents' repeated assertion that the precise scope of persons bound by the 1984 settlement was litigated and decided at that time is preposterous, as is their claim that petitioners have somehow conceded that they are members of the class.[9]

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[8] The "in aid of jurisdiction" exception permits injunctions only while the district court is exercising jurisdiction that might be disrupted by parallel state court proceedings. *See, e.g., Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 880-82 (11th Cir. 1989). Here, the district court retained jurisdiction only over payments from the settlement Fund, and "[n]othing about petitioners' Texas lawsuit affects the operation of the Fund." Pet. at 22-23. Respondents' claim that an award for petitioners in Texas would reduce the money available from the Fund for payouts to veterans (Opp. at 18, 22) ignores the Second Circuit's square holding to the contrary. *See* **A4**, **A22** ($10 million indemnification provision was to be triggered only by awards to "those plaintiffs who opted out of the class" in 1984 and would not be triggered by awards to current petitioners).

[9] It is true — as the Petition noted — that the settlement agreement negotiated by the parties in 1984 stated: "'The Class specifically includes persons who have not yet manifested injury.'" Pet. at 7 (quoting settlement).

(c) Equitable Principles and "Principles and Usages of Law." That an exception to the Anti-Injunction Act might exist, of course, does not "qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum v. Foster*, 407 U.S. 225, 243 (1972); *see also Atlantic Coast Line R.R. Co.*, 398 U.S. at 295-96. Respondents identify no irreparable injury from litigation of their *res judicata* defense in state court. Their ability to litigate their contested *res judicata* defense in state court constitutes an adequate remedy at law,[10] and "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). Moreover, as the States point out, the plain language of the All Writs Act allows only those writs (including injunctions) that are "agreeable to the principles and usages of law" that have traditionally been employed. Brief *Amici Curiae* of the State of

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That observation is hardly surprising, given the presence of many New York veterans in the case and the requirement of the New York statute of limitations that toxic tort victims must typically sue *before* they manifest any injury, *see* **A12-A13**. This descriptive statement that *some persons in the class* had not yet manifested injury in no way establishes the quite different proposition, advanced now by respondents, that *all persons who had not yet manifested injury* were in the class of persons to be bound. Respondents' expansive view of this language is contrary to the contemporaneous view of the Second Circuit that only persons who subjectively *believed* they were injured (whether or not the injury had manifested as of 1984) were class members. *See* Pet. at 5-6 & n.5. Thus, the only relevant issue concerning class membership ever litigated and decided before this case was that *some* of the persons in the class were persons who had a subjective belief that they were injured.

Petitioners, of course, made no "concession" in Pet. at 7 n.8 that they were members of the class. Rather, they expressly reserved "their contract law objections" to that conclusion, preparatory to a remand from this Court's reversal of the judgment below. It is only "for purposes of review in this Court," *id.*, that petitioners have cleared away such fact-bound issues in order to present a clean legal dispute on the second Question Presented.

[10] *See, e.g., De Cosme v. Sea Containers, Ltd.*, 874 F.2d 66, 68-69 (1st Cir. 1989) (holding that "legitimate question whether . . . res judicata . . . would apply" is "properly to be determined by the [state court]"); *Lamb Enters., Inc. v. Kiroff*, 549 F.2d 1052, 1058-59 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977) (observing that availability of injunction turns on "availability of adequate state court remedies" and refusing injunction, with reference to state court civil action for money damages, because there was "not the slightest reason . . . to doubt the ability or willingness of the state judges" to resolve the *res judicata* defense).

Texas, *et al.*, at 9 (citing *Riggs v. Johnson County*, 73 U.S. 166, 190 (1868)). Respondents do not contest that "given the long-settled practice of preclusion issues being decided by the second court, *no* exercise of power under § 1651(a) could ever be justified by the view of the courts below that the Texas courts simply cannot be trusted to adjudicate this issue properly." *Id.*

In sum, respondents' attempted rehabilitation of the decision below enhances, rather than reduces, the basis for certiorari by demonstrating that this case provides an apt vehicle for this Court to address the role state courts should play in resolving *res judicata* defenses raised in state court suits that follow class action settlements in federal court, and to make plain that the All Writs Act and Anti-Injunction Act, far from inviting circumvention of limits written by Congress into its removal statutes, *reinforce* the architecture of federalism that those statutes help to define.

3. Respondents' answer on the second Question Presented is no more reassuring. Respondents' *ad hominem* argument is absurd. According to respondents, petitioners can be dismissed simply as greedy claimants who are intent on upsetting a carefully negotiated, reasonable settlement that works to the advantage of every other Vietnam veteran. *See* Opp. at 22 (petitioners "seek individual advantage at the expense of their fellow class members"); *id.* at 30 (petitioners' case would nullify the 1984 settlement "for the many thousands of class members who have already received or will receive disbursements"). But the Second Circuit has already ruled that a recovery by petitioners would not draw money from the Fund. *See* note 8, *supra*. Moreover, respondents simply ignore the *amicus* brief filed by Admiral Zumwalt and 31 organizations that represent over eight million veterans. These organizations, which are in a much better position to evaluate the interests of Vietnam veterans than respondents, urge this Court to consider the broad due process issues raised by this case. *See* Brief *Amici Curiae* of Agent Orange Coordinating Council, *et al.*

On the substance of the second Question Presented, respondents simply pretend that petitioners advance only a fact-specific claim "that the district court erred in dismissing their claims as barred by the Settlement Agreement." Opp. at 24. In truth, petitioners have removed all fact-bound issues from this case by assuming that the parties in 1984 intended to extinguish future claims of persons not

then before the court. *See* Pet. at 7 n.8; note 9, *supra*. Thus, the second Question Presented raises only broad legal issues concerning "the procedural standards governing the conduct of class actions" in a new context, one which is of "significant and growing importance." Pet. at 25 & n.33. In noting the recurring issues in this area of "future interest" litigation, the Petition argued that this Court should pass on the acceptability of the "quasi-legislative" analysis of due process issues employed by the Second Circuit below. Rather than enter the debate at that level, respondents simply advance their views of the facts of this case. *See* Opp. at 24-30. Those arguments hardly resolve the important problems of principle in this area which this Court has never addressed. Because nothing in the Opposition renders this case ineligible for this Court's initial review of the issues, certiorari is warranted.

CONCLUSION

For all these reasons, the Petition should be granted.[11]

Respectfully submitted,

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[11] Petitioners note that the 50 States and the 31 veterans organizations have urged a grant of certiorari *only* as to the instant petition, No. 93-860. There is no *amicus* support for granting review of a separate petition, No. 93-1035, filed by other plaintiffs who lost in the Second Circuit below and who are represented by entirely separate counsel. That petition is simply a "me too" document, adding nothing of substance beyond what petitioners in this case have put before the Court. Petitioners respectfully suggest that the issues posed by the Second Circuit decision should be briefed and argued on the merits solely by the appellate counsel on the instant petition, who are most familiar with the case and who initially developed those issues (counsel in No. 93-1035 did not even appear in the district court, *see* **A44**). Moreover, unlike petitioners in No. 93-1035, *see* Opp. at 6; **A45**, present petitioners have received no payments from the settlement Fund. Petitioners therefore urge that merits review be granted only on the instant petition.

APPENDIX

Excerpt from Brief *Amici Curiae* of the States of Alabama, Arkansas, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, South Dakota, Texas, Utah, West Virginia, Vermont; and the Commonwealth of Massachusetts, in Support of Appellants, filed in *Ivy v. Diamond Shamrock Chemicals Co.*, 2d Cir. No. 92-7575, dated Sept. 16, 1992, pp. 11-15.

II. THE DECISION BELOW CANNOT BE JUSTIFIED AS MERE ENFORCEMENT OF THE DISTRICT COURT'S PRIOR INJUNCTION BECAUSE PLAINTIFFS HAVE NOT VIOLATED ANY SUCH INJUNCTION.

In addition to defending its removal jurisdiction, the district court also held that "a new and independent basis for subject matter jurisdiction is not necessary for the court to rule on the merits of plaintiffs' claims" because, "[b]y barring 'each and every plaintiff and member of the . . . class . . . from instituting or maintaining any action against any of the defendants,' 618 F. Supp. at 624, the court effectively issued an injunction which bars the current actions." 781 F. Supp. at 916 (ellipses in original) (quoting from ¶ 5 of the Final Judgment in the *Agent Orange Litigation*). The court then asserted continuing jurisdiction to enforce what it now labels an "injunction." *Id.*

An injunction to prevent relitigation of issues in a state court must be carefully and narrowly construed in order to pass muster under the Anti-Injunction Act, 28 U.S.C. § 2283. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 144, 148 (1988) (reversing a federal injunction preventing a plaintiff "'from seeking to relitigate in any state forum the issues finally decided' in the federal court's [prior] dismissal"). Accordingly, the federal court's recitation that the settling claimants are "barred" from relitigating their claims by ¶ 5 of the Order and Final

Judgment of Dismissal — which the court assumed to be a superficially broad injunction — must be read in light of the Order's express provision that the Order was intended to implement the previously approved Settlement Agreement, *Agent Orange Litigation*, 618 F. Supp. at 624, and in light of ¶ 2 of the Order, which provides that the "Settlement Agreement shall be consummated in accordance with its terms." *Id.* Paragraph 6 of the Settlement Agreement makes clear that state court, as opposed to federal, tort actions by future claimants are still possible and are in fact anticipated:

> The Fund shall indemnify all defendants . . . for all final compensatory judgments . . . rendered against any of them in all state-court actions alleging harm caused by exposure to Agent Orange . . . not to exceed an aggregate amount of $10 million.

Agent Orange Litigation, 597 F. Supp. 740, 864 (E.D.N.Y. 1984). The district court subsequently confirmed that the Settlement Agreement expressly contemplates state court actions such as those at issue here:

> [A] sum of $10 million must, in accordance with the settlement agreement, be placed in reserve for a period of twenty-five years from the date of the settlement. . . . Under the terms of the Settlement Agreement, *this reserve will be used to cover possible claims in state courts. It will be available to compensate injured Vietnam veterans exposed to Agent Orange, should future evidence indicate a legally cognizable link between Agent Orange exposure and specific ailments.* While it is unlikely that claims will be viable in state courts in view of the court of appeals' holding that there is no basis for the claims, this sum will be invested in reserve against that possibility.

Agent Orange Litigation, 689 F. Supp. 1250, 1259-60 (E.D.N.Y.

1988) (emphasis added).[1]

It is beyond cavil that, when read in their entirety, the Settlement Agreement and the district court's orders implementing it (1) expressly contemplated "claims in state courts" such as those plaintiffs have now brought in Texas, and (2) provided a special, segregated fund to assure indemnification of any damages that might be awarded by the state courts, although it was at the time deemed unlikely that any future plaintiff could overcome the evidentiary and causation hurdles which had led to the dismissal of all claims then pending in federal court. Because these suits were, by the district court's own *contemporaneous* interpretation, expressly contemplated and provided for in the Settlement Agreement and accompanying court orders, the district court cannot now insist that these suits are enjoined by the more vaguely worded "bar" mentioned in the Final Judgment implementing and incorporating that Settlement Agreement. Although an appellate court should "take careful account of the explanatory opinion issued by the district judge at the time the decree was entered," *United States v. Western Electric Co.*, 900 F.2d 283, 294 n.10 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990), this Court should "reject [any] suggestion" that Judge Weinstein's subsequent reinterpretations of the decree "should be afforded some 'special' deference," even if he had some part in "draft[ing] the pivotal provision" and even if he "has had enormous experience overseeing the case and the decree since its inception." *Id.* at 294.[2]

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[1] Even now, while asserting in one place that plaintiffs' state court suits are barred by its injunction, the court below elsewhere confirms that from the outset it anticipated "suits of this kind," 781 F. Supp. at 912, and that its Settlement Agreement therefore provides a mechanism for indemnifying defendants "from any judgments obtained in state court actions by members of the class." *Id.* at 908.

[2] In similar circumstances, the D.C. Circuit refused to defer to Judge Harold H. Greene's subsequent interpretations of a consent decree provision that he himself had drafted in the case that broke up the Bell System, despite Judge Greene's decade of intensive experience with that

Agreements that end lawsuits are contracts that the court is not free to expand, constrict or otherwise rewrite retroactively. *Janus Films, Inc. v. Miller*, 801 F.2d 578, 583 (2d Cir. 1986); *Artvale Inc. v. Rugby Fabrics Corp.*, 303 F.2d 283 (2d Cir. 1962). Nor is the district court free to reinterpret the scope of the alleged injunction it previously issued to implement that agreement. As the Supreme Court recently (and unanimously) reaffirmed, the scope of an injunction permissible under § 2283 depends upon the "precise state of the record and what the earlier federal order *actually* said; it [does] not permit the District Court to render a *post hoc* judgment as to what the order was *intended* to say." *Chick Kam Choo*, 486 U.S. at 148 (emphasis in original). The district court's revisionism is out of order and must be rejected.

Because state court suits of this kind were expressly provided for by the Agent Orange judgment, plaintiffs did not violate that judgment by bringing suit in the Texas courts. Defendants are still free to raise their *res judicata* defense in the courts of Texas, of course, but the court below was without subject matter jurisdiction to consider it. The district court's refusal to enforce, or even acknowledge, the Anti-Injunction Act breaches an important bulwark of federalism.

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enormously complicated case. *See United States v. Western Elec. Co.*, 900 F.2d at 293-94.